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No. 389

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The majority and dissenting opinions in the Court of Claims have not yet been reported. The majority opinion will be found at pages 29–31 of the record; the minority opinion at pages 31–41.

JURISDICTION

The Court of Claims entered judgment in this case on June 10, 1929. (R. 41.) The petition for certiorari was filed September 10, 1929. (R. 42.) Certiorari was granted November 25, 1929. (R. 43.)

QUESTIONS PRESENTED

First. Did the Act of June 17, 1910, c. 297, Sec. 4, 36 Stat. 468, 531, vest in the Secretary of the Treasury the exclusive right to contract for the telephone service in use at the War Department in Washington, D. C., during the first part of the year of 1918?

Second. Is the petitioner entitled under the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) to recover upon a contract implied in fact, compensation not provided for in the General Supply Committee contract executed by the Secretary of the Treasury and the petitioner, for the difference between the cost and the salvage value of a large private branch exchange switchboard which was installed in the War Department on June 22, 1918, to meet the telephone requirements of that Department growing out of the World War and which was gradually dismantled after the Armistice?

STATUTES

Section 4 of the Act of June 17, 1910, c. 297, 36 Stat. 468, 531 (U. S. C. Title 41, Sec. 7), provides as follows:

> That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Sec-

retary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committe shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committe shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided,* That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall

> have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further,* That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him.

The Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272), under which this suit was brought, provides in Section 1:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer

> or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation * * * for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: * * *.

Section 2 of the Act, the only other material section, gives the Court of Claims jurisdiction where the claimant is dissatisfied with the Secretary's action.

STATEMENT

The amended special findings of the Court of Claims establish the following facts:

Pursuant to Section 4 of the Act of June 17, 1910 (36 Stat. 531, pp. 2–4, *supra*), the petitioner entered into a contract with the Secretary of the Treasury, known as the General Supply Committee contract, which provided that the petitioner would "at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia" for the fiscal year ending

June 30, 1918, and would install and maintain the necessary telephone equipment at certain rates and rentals named therein. This contract was similar in all material respects to that entered into for the preceding fiscal year. Under these annual General Supply Committee contracts, petitioner furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, its chief revenue being derived from mileage charges upon station lines, charges for telephone stations, and local messages. (R. 13–14.)

The Mexican border troubles in 1916 and the unrestricted German submarine policy early in 1917 marked the beginning of increased telephone activities at the War Department. (R. 17.)

The 3-position, No. 4, switchboard then in use, equipped to handle 280 lines, was replaced on March 23, 1917, by a 5-position board. (R. 17.) About the beginning of the World War (April 6, 1917) petitioner, anticipating an abnormal increase of the telephone business at the War Department, called its engineers together and planned to handle the prospective increase in business. Soon thereafter petitioner asked the War Department for additional space in which to install telephone facilities. (Finding XII, R. 20.) The telephone service increased rapidly and the new supply contract was entered into between the parties on May 18, 1917, for the fiscal year beginning July 1, 1917, and ending June 30, 1918. (R. 13.) The 5-position

board had been enlarged to 9 positions by August, 1917, prior to which petitioner ordered a 12-position, No. 604, type of switchboard to meet the anticipated requirements. (Finding VIII, R. 17–18.)

The latter board was placed in service in October, 1917, and by November, 1917, petitioner's officers foresaw that, due to war conditions, the requirements of the War Department for telephone service would exceed the line capacity of the No. 604 type switchboard and that it would be necessary to provide more adequate switchboard equipment. They accordingly conferred with John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and Arthur D. Scovell, Director of Telephones for the War Department, and also with a committee appointed by the Secretary of War to consider the question of the floor space which would be required for the new equipment. There being insufficient space then available, the War Department decided to erect a separate building, and the petitioner's officials cooperated with the War Department in the preparation of plans for such building. Petitioner also submitted to the Secretary of War blue prints showing on the floor plans of the proposed building the location and arrangement of the switchboard equipment which it planned to install. These plans were approved and returned to the petitioner, and petitioner gave final orders to the manufacturers for the proposed switchboard and equipment. Petitioner's District

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Manager then consulted with petitioner's Chief Engineer who had been sent from New York to take charge of the Government situation and to whom the District Manager reported, and "told him the whole installation ought to be held up until they got a written order." (R. 18–22.)

The Chief Engineer objected to such a course and told the District Manager that "they wanted to do everything possible for the Government, and would take their chances of getting paid," and notified the District Manager "to go ahead with the installation." Prior to installing the switchboard and equipment, petitioner advised Mr. Scofield, Chief Clerk of the War Department, and also Mr. Scovell, Director of Telephones for the War Department, "that it expected the Government to pay the cost of the new switchboard less salvage." The pertinent findings are definite that Mr. Scovell "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer"; that "Mr. Scofield never represented to plaintiff's representative that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to the installation notify the plaintiff that he would not pay for same"; that the Secretary of War "made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that

plaintiff contemplated submitting claim for the same"; and that neither the Secretary of War nor Mr. Scofield at any time approved payment for the switchboard, and "the War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract." (R. 19, 21–22, 25.)

The building to house the new switchboard and equipment was erected by the War Department at a cost of $138,000, the petitioner contributing $8,000 to avoid any impairment in the construction. This was in line with the previous practice, as the petitioner "had always theretofore provided at its own expense the necessary telephone switchboards and equipment for use at the War Department," and the Government "had always provided the necessary space for such switchboards and equipment." (R. 19.)

The new board was installed and service transferred to it on June 22, 1918. (R. 22–23.) For transferring the service to the new building petitioner submitted to the War Department a bill for $35,917.05, which stated that it covered the cost of labor and material involved in accordance with the provisions of the General Supply Committee contract. The War Department paid the bill. (R. 23–24.)

Like the switchboards theretofore used in the War Department, the new switchboard (called in

the Findings a "No. 1" switchboard), although larger, more costly, and of a different type, was a common battery private branch exchange switchboard and possessed the same general features as the preceding board. It was a 45-position board, cost $401,113.24, was expanded by the time of the Armistice to a 75-position board, and served the sixty-five buildings in the District of Columbia in which the War Department was housed during the war. (R. 22–25, 28.)

Nine days after the new board was installed the new General Supply Committee contract for the fiscal year beginning July 1, 1918, became effective. This contract was similar in most respects to the preceding contracts. It provided for increased rates, including an additional switchboard charge for multiple jacks, which amounted to $10,153.56 for the succeeding twenty-nine months the new board was in service. (R. 14–17, 24.)

After the new switchboard was installed, petitioner continued to submit bills to the War Department on the same rental basis of $24 per year as it had in the case of the old switchboard. (R. 24.)

SUMMARY OF ARGUMENT

I. Under the Dent Act, upon which petitioner's suit is based, the facts must show dealings by representatives of the Government authorized to contract. Under the Act of June 17, 1910, the Secretary of the Treasury was the person exclusively

authorized to enter into contracts for telephone service.

II. The findings do not establish any contract implied in fact. The whole subject was covered by a written contract then in existence, and an implied contract may not exist where there is an express contract.

III. Petitioner's attitude showed that it did not understand that the Government implied that it would pay for the switchboard. Although petitioner notified representatives of the Government that petitioner expected payment for the cost of the new branch exchange switchboard less salvage, no representative of the Government stated that the Government would pay for it, and thereafter petitioner apparently recognized the applicability of the existing written contract by making charges under it for the installation of new equipment, for multiple jacks, and for rental. The fact that the annual rental was only $24 is immaterial, as the policy of petitioner had always been to charge merely a nominal rental and to derive its revenue from other sources.

IV. The situation which gave rise to the necessity for the new switchboard was not one which could not have been foreseen at the time when the General Supply contract for the period in question was executed. During 1917 and 1918 there had been seven new installations of equipment, some of which had been extremely costly. No additional charge on ac-

count of these installations was ever suggested. Petitioner foresaw the necessity of this switchboard months before it was installed and ordered it before it suggested that the Government should pay for it.

V. The new equipment was of the kind and type provided for in the written contract. The War Department inspected and approved the plans and specifications for the equipment because it was constructing a building to house it, and this action can not be construed as an admission that the Government was liable to pay for the equipment.

VI. The Government did not become liable for the cost of the switchboard by virtue of use of it after a bill for it had been presented. Petitioner was under obligation to furnish such equipment under its written contract.

VII. The petitioner was reimbursed by its parent company, the American Telephone & Telegraph Company, for the expense of this switchboard, upon the ground that such expense was an expense of the general telephone business and the income of both the parent company and petitioner was largely augmented by the increased business resulting from the installation of the new switchboard.

ARGUMENT

I

NONE OF THE GOVERNMENT OFFICIALS INVOLVED HAD ANY AUTHORITY TO CONTRACT

Petitioner's suit is based upon the Dent Act. (40 Stat. 1272.) Under the Dent Act, for claimant to

prevail, the facts must show a contract with Government officials competent and authorized to contract, and the facts relied on must establish a contract implied in fact, as distinguished from one implied in law. *Balt. & Ohio R. R.* v. *United States,* 261 U. S. 592, 597, 599; *Jacob Reed's Sons* v. *United States,* 273 U. S. 200, 202.

The Government contends that neither of these situations is established by the findings of the court below, and its findings, whether of facts or of mixed questions of law and fact, are conclusive on this Court. Statements in the opinion can not be considered. *United States* v. *Swift & Co.,* 270 U. S. 124; *Brothers* v. *United States,* 250 U. S. 88, 93.

We submit that the findings of the court below show that there was no contract with Government officials capable of, or intending to, contract, and that no contract, either in fact or implied in fact, is established by the findings.

As to the officials involved: On the Telephone Company's side appears alone Charles T. Clagett, petitioner's District Manager having charge of its business office, who looked after collections, the ordering of telephones, and all business pertaining to the public, including the Government's contractual relations with the Telephone Company. (R. 21.)

The Government's representatives who dealt with Clagett were Scovell and Scofield. The find-

ings recite that Scovell "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer." (R. 20.) Scofield was Assistant to the Secretary of War and Chief Clerk of the War Department; he had supervision of the telephone and telegraph division, and ranked next to the Secretary of War in the control of that service, which was under his general direction. (R. 19.)

Under the Act of June 17, 1910, pp. 2–4, *supra*, which provides for the furnishing of telephone service to all departments of the Government, the Secretary of the Treasury was exclusively authorized by law to enter into contracts for telephone service. Neither the Secretary of War nor his Assistant, Scofield, had any such power, and the court below found that "the War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract." (Finding XX, R. 25.)

Section 4 of the Act of June 17, 1910, *supra*, provides specifically that telephone, electric light, and power service for the various executive departments in the District of Columbia shall be obtained by the Secretary of the Treasury upon annual contract instead of by the several departments. The two clauses upon which petitioner relies as qualifying the Secretary's power, viz., "when the public

exigencies do not require the immediate delivery of the *article,*" and "*Provided,* That the *articles* intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments," have, we submit, no reference to the obtaining of telephone, electric light, and power service. The "articles" to which those clauses relate are specifically mentioned—fuel, ice, stationery, and other miscellaneous supplies. Telephone service, electric light service and power service are covered specifically in a subsequent clause of the same section. It therefore appears that the Secretary of the Treasury had the sole authority to contract for such telephone service as was required by the various executive departments in Washington, including the War Department. The word "so" in the proviso of that Act, that telephone service, etc., "shall be *so* obtained by him," refers to the method by which the United States shall obtain such service, and does not refer to the restrictions surrounding the articles mentioned.

A further reason why the telephone and power service clause is not subject to the preceding restrictions is that advertisement is obviously not contemplated in contracting with such noncompetitive concerns. Also in view of the fact that seven months were required to order and install such a switchboard, there was no such requirement for immediate delivery as to prevent petitioner from having ample

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time to make any necessary contracts with the Secretary of the Treasury upon the subject. And such written contracts were thus actually entered into.

Petitioner confuses telephone *service* with the telephone *switchboard,* which is merely part of the equipment necessary to the furnishing of adequate telephone service to the War Department. Regardless of the varying sizes and types of the necessary switchboards, the service still remains telephone service as provided in the Act. Furthermore the switchboard herein involved was furnished under these Supply Contracts, exactly as had been all other preceding installations. (See pp. 22–23, *infra.*) The acts of the Telephone Company indicate that it did not entertain the belief that the Government expected to pay for this board, except as the controlling Supply Contracts provided. (See pp. 18–20, *infra.*)

Apparently since the passage of the statute in 1910 (36 Stat. 468, 531), *all telephone service of whatever kind, nature, or amount* has been furnished to the different departments of the Government of the United States under these written contracts entered into on behalf of the United States by the Secretary of the Treasury. Certainly there was such a contract with this petitioner during the time involved in this litigation. (R. 13–14.)

Although the Government contends that under the provisions of the 1910 Act the Secretary of the

Treasury had exclusive authority to contract for telephone service, the contention is not vital to the Government's case here because even if power to contract for telephone service was not exclusively vested in the Secretary of the Treasury, and the Secretary of War also had such right, nevertheless the point is not open to petitioner because it did actually enter into a written contract with the Government through the Secretary of the Treasury. Therefore, such written contract being in existence, whether or not the Secretary of War might possess also the power to contract would not free petitioner from the obligations assumed in the written contract which it did enter into.

II

THE FINDINGS DO NOT ESTABLISH ANY CONTRACT IMPLIED IN FACT

Two objections to the existence of a contract implied in fact are the lack of authority of the Government's representatives to make a contract and the fact that there was no discussion of the time when the new equipment was to be furnished, or what it was to cost.

Moreover, there was no possible consideration for any such contract, inasmuch as the whole subject was covered by a written contract then in existence between the Government and the Telephone Company, under which the whole burden and expense of furnishing all telephone service, of whatever kind,

nature, or amount, to the United States was placed on the Telephone Company. An implied contract may not exist where there is an express contract. *Hawkins* v. *United States*, 96 U. S. 689, 697; *Perkins* v. *Hart*, 11 Wheat. 237. Consequently, Scofield was under no obligation to pay any attention whatever to petitioner's statement that it expected to be paid for the equipment in question.

This brings us to a discussion of the written contracts existing between the Telephone Company and the United States, for the purpose of noting the effect of those contracts, and the acts of the parties concededly done under them, upon the Telephone Company's claim here.

Under the contract in force from July 1, 1917, to June 30, 1918 (Finding III, R. 13–14), petitioner agreed to furnish telephone service "to all, any, or either of the departments or other offices or establishments of the Government." Could the obligation of the Telephone Company be fixed under broader or more comprehensive language? But the contract is even more explicit. It stated "that said company will install, equip, and maintain such telephone equipment *as may be required* in the District of Columbia," and in order that no possible contingency might be permitted to escape the sweeping scope of the contract, it was further provided that "should additional service or *equipment* be required * * * additional service or equipment will be furnished at the rates named herein." This

was the language of the contract in force from July 1, 1917, to June 30, 1918, and it is conceded that the telephone equipment for which the petitioner is here demanding payment was installed on June 22, 1918, within the time covered by this contract. (Finding XIV, R. 23.)

That the contract thus referred to was not a special contract entered into by petitioner under any failure to comprehend its scope, is shown by the fact that a similar contract was in force from July 1, 1916, to June 30, 1917. (R. 13.) After the new equipment was installed, on June 22, 1918, another contract was entered into between petitioner and the United States, containing the same broad clauses requiring petitioner to furnish telephone service to all departments of the Government "at its own risk and expense," and to "install equip, and maintain *such telephone equipment as may be required.*" (R. 14.) Indeed, the new contract, covering the precise period during which the petitioner was using this new equipment, contained even more drastic clauses with respect to the rights of petitioner. It provided that "should the subscriber desire any other service or *equipment* not specified herein, the company's rates and regulations filed with the Public Utilities Commission of the District of Columbia will apply," and then contained the significant clause that "the Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees

that the equipment *now in service* is covered by this contract." (R. 16.)

This new contract became effective nine days after the new switchboard was installed. We submit that petitioner can not, in the face of these provisions, which treat the equipment as the property of petitioner, consistently contend that it had sold the switchboard to the Government. Neither may the Telephone Company properly contend that such new contract does not cover or apply to the switchboard which had thus been furnished under the immediately preceding contract, because under the new contract the Telephone Company was receiving the contract rental and other applicable rights provided for in the new contract.

III

PETITIONER'S ATTITUDE SHOWED THAT IT DID NOT UNDERSTAND THAT THE GOVERNMENT IMPLIED THAT IT WOULD PAY FOR THE SWITCHBOARD

The Government insists that the Telephone Company did not, prior to the installation of the new equipment or even while the new equipment was being used after installation, believe or understand that the new equipment was not covered by the provisions of the General Supply Contracts above referred to. It billed the United States the expense of the physical installation of the new equipment in the new building provided therefor by the Government. As it is now the contention of petitioner that this new equipment had nothing to do

with the General Supply Contract, it is significant that in submitting its bill for over $35,000 for the expense of installation of the new equipment it stated that the bill "covered the cost of the labor and material involved *in accordance with the provisions of the General Supply Committee contract.*" (Finding XVI, R. 23–24.) And that this significant language was not a mere oversight is shown by the fact that, after the new equipment had been installed, petitioner collected *rental charges* for such new equipment at the rates fixed by the General Supply Committee Contract then in force. (Finding XVI, R. 24.) Furthermore, when multiple jacks (a switchboard accessory) were added to the new equipment, these multiple jacks were charged for under the specific provisions of the General Supply Committee Contract then in force, and the Government paid the Telephone Company more than $10,000 for the same. (Finding XVI, R. 24.)

The Government furnished the operators for the new equipment, as it had under former installations of new equipment, and it defrayed the expense of physically installing the new equipment, as it had in the past when new equipment was installed.

The theory of petitioner seems to be that the Government was *purchasing* the switchboard in question, but the findings indicate that to the end petitioner treated the switchboard as its own property, because it apparently sold the board on its own responsibility, and simply reported to the

United States the amount which it had received as salvage. (Findings XXVIII and XXIX, R. 28–29.)

Likewise, during the period of government control the Telephone Company was allowed eight per cent on the cost of this switchboard—a fact which is, we submit, antagonistic to the Company's present contention that the switchboard had, in effect, been purchased by the United States, and therefore belonged to the United States and not to the Telephone Company.

It therefore seems highly probable that petitioner, as well as the Government, understood at the time of and after the installation of the new equipment that it was furnished under the applicable General Supply Committee Contract.

Petitioner stresses the fact that Clagett advised Scofield that "it expected the Government to pay the cost of the new switchboard less salvage," and insists that the fact that Scofield did not notify petitioner that the Government would not pay for the switchboard constitutes such a silence on the part of Scofield as to amount to assent. No one in behalf of the Government ever gave any express assent. Aside from the fact that the Secretary of the Treasury, and not Scofield, was the only person having authority to enter into contracts for telephone service, the Government contends that this contention on the part of petitioner is unsound.

In the first place, the Government knew that under petitioner's contracts petitioner was required to furnish all telephone apparatus found necessary to take care of the Government's telephone business; so felt that the suggestion of Clagett was irrelevant. In the second place, the Government knew that petitioner, in compliance with its contracts, had installed without charge, seven new additional groups of equipment for the purpose of handling the constantly increasing business, getting its compensation therefor from the increase of business itself. (See pp. 25–26, *infra*.)

The fact that the annual rental charge for the new switchboard was only $24 is immaterial. The fact that the new switchboard cost approximately $400,000 is persistently presented by petitioner in connection with the annual rental fee of $24, fixed by the General Supply Committee Contract; and all of the changes are rung upon the seemingly unfair proposition that petitioner should be required to furnish apparatus costing $400,000 upon an annual rental of $24. Even the dissenting opinion in the court below presents this contention. (R. 36.) The annual rental fee provided in these contracts has never had anything whatsoever to do with the cost of the apparatus thus furnished. The rental fee was a nominal fee, and was so regarded by the parties. The same rental fee was fixed in all of the telephone contracts entered into, and the findings expressly show that it was "the policy of the

plaintiff to charge merely a nominal rental for such equipment, while the chief revenue was being derived from other sources." (Finding II, R. 13.) The revenue from other sources thus referred to would include rentals, local tolls, and long-distance tolls. (For a further discussion of this consideration, see Point VII, p. 31, *infra.*)

IV

THE SITUATION WHICH GAVE RISE TO THE NECESSITY FOR THE NEW SWITCHBOARD WAS NOT ONE WHICH COULD NOT POSSIBLY HAVE BEEN FORESEEN WHEN THE APPLICABLE WRITTEN CONTRACT WAS ENTERED INTO

The history of the contractual relations between petitioner and the United States is significant.

As we have stated above, under the Act of 1910 the General Supply Committee Contracts have covered all of the arrangements for telephone service and equipment between petitioner and the United States. Under those contracts there was cast upon petitioner a constantly increasing burden, through the necessity for increased equipment and apparatus, in order to furnish satisfactory telephone service. It is true that the increase in such equipment prior to 1917 was much less than the increase thereafter, but the amount of increase becomes immaterial in contemplating what must have been the underlying attitude of petitioner toward the increase in equipment for the purpose of taking care of an increase in business, and the Government asserts that petitioner always under-

took, whenever it became necessary to take care of increased business, to furnish additional equipment under the terms of the regular contracts.

It is persistently contended by petitioner that the increase of business occasioned by the World War was not contemplated, foreseen, or appreciated by either petitioner or the Government, and that for that reason the existing contracts ceased to control the situation. But the contention can not be sustained in this case.

The findings disclose that about the time of the beginning of the World War petitioner, "anticipating an abnormal increase in the telephone business of the War Department called its engineers together and planned to handle the prospective increase in business." This was approximately six weeks before executing the new supply contract and over one year before the installation of the equipment here sued for. (Finding XII, R. 20.) The facts disclose that the Mexican Border troubles in 1916 accelerated telephone activities at the War Department, and with the announcement by the German Government, on January 31, 1917, of its new submarine policy, the necessity for increased equipment began in earnest. This occasioned a new installation which petitioner furnished under its regular contract charge. (Finding VII, R. 17.)

Four months later, in August, 1917, a second new installation was found necessary, and this also was charged for under the provision and rates fixed by the contract. (Finding VIII, R. 17–18.)

Two months later, on October 1, 1917, came a third installation, consisting of new equipment, "the largest and most modern type of private branch exchange equipment then on the market." (Finding VIII, R. 18.) How similar the description is to the description of the equipment here sued for!

One month later, on November 1, 1917, came a fourth new installation, and a month and a half later, on December 15, 1917, a fifth new installation, and less than a month later, January 9, 1918, a sixth new installation, and after that and prior to June 22, 1918, came a seventh installation, which brought the existing installation up to 4,200 lines. (Finding IX, R. 18.)

All of these seven new installations, the third of which was described in the comprehensive terms quoted above, were admittedly furnished under the General Supply Committee Contracts at the rates fixed in those contracts, without any suggestion on the part of petitioner that such was not its duty under these contracts.

Nor was the necessity for the particular new apparatus here involved, a sudden emergency call upon petitioner. In November, 1917, nearly eight months before the new apparatus was finally installed, petitioner became aware that larger, more extensive equipment was going to be necessary to take care of that which petitioner had agreed to take care of in the written contract which it signed on May 18, 1917, to wit, to "furnish telephone serv-

ice to all, any, or either of the departments * * * of the Government." (Findings III, X, R. 13, 18–19.) And without intimating to the Government that petitioner had any idea of changing the basis of charge on which it was furnishing equipment and service, petitioner in December, 1917, put in its order for the new equipment, so there might be no delay, and wrote the Secretary of War, under date of December 31, 1917, stating that the factory had been ordered to proceed "with the manufacture of the new War Department switchboard." And apparently it was not until January, 1918, that petitioner notified either Scovell or Scofield that petitioner expected to be paid. (Finding XIII, R. 21–22.)

So the Government contends that the sudden increase of business was fully contemplated by the Telephone Company, that it repeatedly increased its installations as the telephone needs increased, and that the final installation of the switchboard here involved was simply a further development of the obligation assumed by the Telephone Company in the contracts executed by the Company after the war had begun and after the necessity for increased service and equipment had become perfectly apparent. This condition may not, we insist, be deemed such a sudden emergency call as should free the Telephone Company from the binding effect of the written contracts under which it agreed to furnish all necessary service and equipment during the period covered by the contracts.

V

THE NEW EQUIPMENT WAS OF THE KIND AND TYPE PROVIDED FOR IN THE WRITTEN CONTRACT

Attempt is made to show that there was something so unique and extraordinary in the character of the new equipment here involved that it should be considered as radically different from any equipment previously furnished. The Government insists there is nothing in this contention. The findings show that *each* new installation made by petitioner to take care of increased business necessitated a type of switchboard different from that replaced. (Finding VII, R. 24.) Although the latest equipment was larger and would handle more lines and cost considerably more than the one previously furnished, nevertheless the new board and the one superseded were used for identical purposes and "possessed the same general features and were both common battery private branch-exchange switchboards." (Finding XVII, R. 24.) But we submit that it would make no difference if the new equipment was of a different kind or character, inasmuch as petitioner had agreed in its contract to furnish all service and all equipment necessary to take care of the Government business, and the history of the matter shows that the Telephone Company was fully apprised of the constant increase in business and the necessity of a constant increase in equipment facilities. The petitioner had

the duty to furnish increased service and increased equipment, and this did not change under the contract simply because of an unprecedented demand for additional service.

Another argument which is advanced to support petitioner's claim for payment for this new equipment is based upon the action of the United States in erecting a new building for the purpose of housing such new telephone equipment. The argument is unconvincing. It has always been the duty of the Government to provide building space within which the Telephone Company might establish the equipment which it was furnishing under its yearly contracts. The available space in the War Department building was exhausted by the seven new installations which had been made to take care of the business. (Finding XI, R. 19.) No more room was available in the existing building, but the necessity for telephone service, both existing and prospective, was constant. The installation of larger apparatus to take care of this increased business would take some time. It was impossible to contemplate the dismantling of the existing equipment, for a single minute, unless other equipment was instantly available for use. It necessarily followed, therefore, that the existing installation must continue to function until the new, enlarged unit could be installed and connected. There being no more space in the existing building,

new construction was necessary, and this new construction was carried out by the United States, not because of any idea that the United States was obligated to pay for telephone equipment, but simply to carry on the ordinary, always-existing duty on the part of the Government to furnish space wherein the Telephone Company might install its equipment. That the Telephone Company fully realized that the construction of this new telephone building did not remove the situation from the purview of the existing written contracts between itself and the Government, is clearly indicated by the fact heretofore alluded to, that the Telephone Company, *under the provisions of the General Supply Contract then in force,* collected from the United States over $35,000 for installation of the new equipment in the new building. (Finding XVI, R. 23.) And it was because the Government was constructing a building to house the telephone equipment which the petitioner was to furnish that the plans and specifications of the equipment were exhibited to the Government, in order that the building, when constructed, might physically be sufficient to take care of such new apparatus. The approval of such plans by the War Department can not be construed as an admission that the Government was liable for the first time in its contracts with petitioner, for the cost of new, necessary equipment.

VI

THE GOVERNMENT DID NOT BECOME LIABLE FOR THE COST OF THE SWITCHBOARD BECAUSE OF THE USE OF IT AFTER A BILL FOR IT WAS PRESENTED

The Government was entitled to service from the new apparatus, regardless of the bill presented by that company. Petitioner insists that, because the Government continued to use the switchboard in question after petitioner had submitted a bill or bills against it for the cost of such switchboard, such continued use renders it liable to pay the bill. Under the Telephone Company's contracts with the Government, it was obligated to furnish all and sufficient telephone service, and the switchboard in question was simply equipment furnished by the Telephone Company as a means of furnishing that service. In furnishing this new switchboard, all that the Telephone Company was doing was what it had agreed to do under its contract.

VII

THE COST OF THIS NEW EQUIPMENT WAS BORNE BY PETITIONER'S PARENT COMPANY AS A PART OF THE GENERAL TELEPHONE BUSINESS

We have suggested above that the acts of the Telephone Company clearly show that it did not really contemplate that the United States either did, or should, agree to buy this switchboard, but that, on the contrary, the Company proceeded under the apparent assumption that the furnishing of the increased service, as well as the increased equip-

ment, was a duty of the Company as one of the general obligations of the telephone business, as a national industry, as distinguished from an installation at the expense of the subscriber, the subscriber to own the equipment.

On this point, we submit that the findings disclose that the general attitude of the telephone industry as a unit undermines the contention that petitioner was really expecting the United States to pay for new equipment because of an increase in requirements due to sudden war conditions.

Petitioner is a subsidiary of the American Telephone & Telegraph Company, which is the parent company. This parent company "considered the problem of increased telephone service at the War Department to be largely *its own* problem." (Finding XII, R. 20.) Consequently, the parent company sent its representatives to Washington to assist petitioner in furnishing service and procuring equipment. (Finding XII, R. 20.) Scovell went into the employ of the Government, his salary being paid by the New York Telephone Company, also a subsidiary of the parent company. (Finding XII, R. 20.)

In furtherance of such general control policy, after the war was over and business had again become normal, the American Telephone & Telegraph Company contributed to petitioner the sum of $1,250,000, which petitioner had been compelled to expend "in order to meet the late war emergency

to make large and extraordinary expenditures on account of plant that would not have been otherwise necessary at this time or in the immediate future," and further stated that such large and extraordinary expenditures "arose out of the requirements of the telephone service of the entire Bell system, and not solely out of the requirements of the telephone service" of the petitioner. (Finding XXI, R. 25–26.) *This $1,250,000 thus contributed included the sum of $328,166.56 specifically designated to apply to "P. B. X., Case No. 20, War Department,"* which means "Private Branch Exchange, Case No. 20, War Department," and which is the specific equipment here sued for. (Finding XXIII, R. 26, 27.)

And there is every reason for fully understanding the propriety of the position thus taken by the parent telephone company. Increased service means increased business to the parent company as well as to the subsidary, and increased business means increased earnings, all of which the findings amply demonstrate.

The Telephone Company is complaining because it had to furnish expensive, new apparatus to take care of increased business, for the *rental* of which new apparatus it was to receive but $24 per year. The record shows, in the first place, as we have shown, that the parent company fully reimbursed petitioner for the expense it went to in installing the new switchboard, yet while the new switchboard

was in use the Bell System received over $945,000 for long-distance tolls, out of which petitioner received approximately $145,000. (Finding XIV, R. 27.) Exclusive of these tolls, the gross revenue of petitioner, obtained from its contracts with the Government during the period when the new switchboard was in use, approximated $535,000. (Finding XXV, R. 27.) During the year preceding the war, the gross revenue, exclusive of tolls, was $5,714.77. (Finding XXV, R. 27.)

In addition to the foregoing, under the increase in rates granted by the Public Utilities Commission, covering the Government contract beginning July 1, 1918, which contract the Telephone Company now insists did not apply to the new switchboard, the Company's revenues increased by approximately $100,000. (Finding XVIII, R. 24.) In addition thereto, while the Government had control of petitioner's telephone business during the period of Government control, the Telephone Company was allowed approximately $80,000 as an annual carrying charge based on a percentage of the book value of the switchboard. (Finding XIX, R. 25.) This makes a total income, which the Telephone Company received from the Government under its contracts with the Government, during the period that the new switchboard was in use, of approximately $860,000. This amount is without taking into consideration the payment by the United States to the Telephone Company, upon the

conclusion of Government control, of an amount exceeding $1,300,000, which included eight per cent return on the Telephone Company's stock during the period of Government control. (Finding XXVII, R. 28.)

The happening of a single contingency prevented the supplying of new apparatus from resulting in the most extraordinary increase in the profits of petitioner, *and that contingency was that the war stopped too soon,* and that contingency was something which, under petitioner's contracts with the Government, petitioner, and not the United States, should face.

CONCLUSION

We submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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